

Colorado Supreme Court Cleans Up Indemnification Timing Mess

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By **Tim Gordon**

The Colorado Supreme Court has finally weighed in and held that the 90-day tolling period for indemnification claims related to construction defects actions also tolls the statute of repose, ending years of confusion and making the tolling provision effective. *Goodman v. Heritage Builders, Inc.*, 2017 CO 13.

As explained in a [prior post](#) on this blog, piecemeal appellate-court decisions made it difficult for developers and general contractors defending against construction defects claims to decide when to bring indemnification claims against their subcontractors and suppliers. Colorado has a two-year statute of limitations and a six-year statute of repose applicable to construction defects claims. Specifically, under Colorado law, a construction defects actions must be brought within two years after the claim arises, but in no case may such an action be brought more than six years after the substantial completion of the improvement to the real property. C.R.S. § 13-80-104(1)(a).

However, Section 13-80-104(1)(b)(II), C.R.S., provides the following 90-day tolling provision for indemnification claims related to construction defects actions:

[A]ll claims, including, but not limited to indemnity or contribution, by a claimant against a person who is or may be liable to the claimant for all or part of the claimant's liability to a third person . . . [a]rise at the time the third person's claim against the claimant is settled or at the time final judgment is entered on the third person's claim against the claimant, whichever comes first; and . . . [s]hall be brought within ninety days after the claims arise, and not thereafter.

This “tolling” provision was meant to allow general contractors and developers to defend against construction-defects claims without having to bring third-party claims against every subcontractor and supplier. Instead, they could wait until the underlying defects action resolved, and then bring their indemnification claims against the relevant subcontractors within 90 days. But there was a problem: The Colorado Court of Appeals had held multiple times that the 90-day tolling period did not toll the six-year statute of repose. See *Sierra Pac. Indus., Inc. v. Bradbury*, 2016 COA 132, ¶ 16; *Shaw Constr., LLC v. United Builder Servs., Inc.*, 2012 COA 24, ¶ 18; and *Thermo Dev., Inc. v. Cent. Masonry Corp.*, 195 P.3d 1166 (Colo. App. 2008) ([discussed here](#)). Therefore, waiting until the underlying construction defects litigation was resolved could result in the indemnification claims being barred by the six-year statute of repose. To make things even more confusing, a division of the Colorado Court of Appeals held that the 90-day tolling period did not apply if the indemnification claim was brought before the underlying construction defects litigation was resolved. See *Sopris Lodging, LLC v. Schofield Excavation, Inc.*, 2016COA158 ([discussed here](#)). Thus, an indemnification claim could be barred by the statute of limitations if brought too early.

But in *Goodman v. Heritage Builders, Inc.*, 2017CO13, the Colorado Supreme Court finally overruled the problematic holdings in *Sierra Pac. Indus.*, *Shaw Constr.* and *Thermo Dev.* and held that the 90-day tolling provision tolls both the statute of limitations and statute of repose. According to the Court, “under section 13-80-104(1)(b)(II), third-party claims are timely irrespective of both the two-year statute of limitations and the six-year statute of repose so long as both the claims are brought during the construction defect litigation or within ninety days following the date of judgment or settlement.” *Id.* at ¶ 12. Given the Court’s language, this holding should also fix the problem caused by the *Sopris Lodging* case of indemnification claims being barred if brought too soon.